***THE HON'BLE SRI JUSTICE BILAL NAZKI**

**THE HON'BLE SRI JUSTICE V.V.S.RAO**

**AND**

**THE HON'BLE SRI JUSTICE P.S.NARAYANA**

**+Writ petition Nos.22042, 24191, 24308, 24324**

**and 24325 of 2003**

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% 27-01-2005

**#** Between:

1. The Principal Accountant General, Andhra Pradesh,

Saifabad, Hyderabad and others.

…Petitioners

A N D

C. Subba Rao, S/o. C. Tataiah, Retired Senior Audit Officer,
O/o. Principal Accountant General, Andhra Pradesh. Hyderabad

And others

…Respondents

! COUNSEL FOR THE PETITIONERS: Mr.A.RAJASEKHARA REDDY,

Senior Central Government Standing Counsel

^ COUNSEL FOR RESPONDENTS: Mr.G.VIDYA SAGAR representing

Mr.P.V.P.Mrutyanjaya Rao, Advocate

< Gist:

> Head Note:

? CITATIONS:

1. 2002 (4) ALT 550
2. 1989 Supp. (2) SCC 486 = AIR 1990 SC 285
3. 2002 (1) CAT 365 (AIS)
4. AP FB Judgments (1997-2001) 50
5. AIR 1981 SC 1922 (para 17)
6. 2001(1) Administrative Total Judgments 151
7. Halsbury's Laws of England Volume 45 (2) Fourth Edition (Reissue)
8. AIR 1998 SC 2102 (para 8) = (1998) 5 SCC 542
9. AIR 2000 SC 2163 (para 11) = (2000) 4 SCC 35
10. (2000) 3 SCC 736
11. (2000) 3 SCC 733

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

THURSDAY, THE TWENTY SEVENTH DAY OF JANUARY
TWO THOUSAND AND FIVE

PRESENT

**THE HON'BLE MR JUSTICE BILAL NAZKI**

**THE HON'BLE MR JUSTICE V.V.S.RAO**

**And**

**THE HON'BLE SRI JUSTICE P.S.NARAYANA**

-

**WRIT PETITION NO : 22042 of 2003**

Between:

1. The Principal Accountant General, Andhra Pradesh, Saifabad,

Hyderabad.
2. The Comptroller and Auditor General of India, Bahadur Shah Zafar

Marg, New Delhi.

**….PETITIONERS**

AND

C. Subba Rao, S/o. C. Tataiah, Retired Senior Audit Officer,
O/o. Principal Accountant General, Andhra Pradesh. Hyderabad.

**.....RESPONDENT**

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ of Certiorari or any other appropriate writ, order or direction, calling for the records, pertaining to OA No. 797 of 2002 dated 12.11.2002 on the file of the Hon'ble Administrative Tribunal, Hyderabad Bench, Hyderabad and quash the same as illegal, arbitrary, contrary to law and unconstitutional and declare the same as void *ab inito*, null and honest in the eye of law.

**WRIT PETITION NO : 24191 of 2003**

Between:

1. The Prinicipal Accountant General, Andhra Pradesh, Saifabad,

Hyderabad.
2. The Comptroller and Auditor General of India, Bahadur Shah Zafar

Marg, New Delhi.

**….PETITIONERS**

AND

R. Dharmarajan, S/o. D. Rama Krishna Iyer, (Retd) Dy. Accountant General, Office of the Principal Accountant General (Audit), Andhra Pradesh, Hyderabad. S-2, Divya Durga Apts., Kavadiguda, Hyderabad.

**.....RESPONDENT**

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ of Certiorari or any other appropriate writ, order or direction, calling for the records, pertaining to O.A. No. 714 of 2003 dated 23.07.2003 on the file of the Hon'ble Central Administrative Tribunal, Hyderabad Bench, Hyderabad and quash the same as illegal, arbitrary, contrary to law and unconstitutional and declare the same as void ab initio, null and void and nonest in the eye of law and pass such other and further order or orders as this Hon'ble Court may deem fit and proper.

**WRIT PETITION NO : 24308 of 2003**

Between:

1. The Principal Accountant General, Andhra Pradesh, Saifabad,

Hyderabad
2. The Comptroller and Auditor General of India, Bahadur Shah Zafar

Marg, New Delhi

**….PETITIONERS**

AND

1 M.N. Avadhanulu, S/o Subba Rao,
249/2, R.T. Saidabad Colony, Hyderabad - 500 059.
2 Smt. Rajee Sampath Kumaran W/o R. Sampath Kumaran,
R/o 12-2-417/89, Saradanagar, Kulsumpura Post, Hyderabad

**....RESPONDENTS**

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ of Certiorari or any other appropriate writ, order or direction, calling for the records, pertaining to O.A.No. 354/2003 dated 10-9-2003 on the file of Hon'ble Central Administrative Tribunal, Hyderabad Bench, Hyderabad and quash the same as illegal, arbitrary, contrary to law and unconstitutional and declare the same as void ab initio, null and void and nonest in the eye of law.

**WRIT PETITION NO : 24324 of 2003**

Between:

1. The Accountant General (A&E), Andhra Pradesh Saifabad, Hyderabad.
2. The Comptroller and Auditor General of India, Bahadur Shah Zafar

Marg, New Delhi.

**….PETITIONERS**

AND

1 Shri M.G. Krishna, S/o. M.S.Ramachary, R/o. 201, Krishna Residency H.No.7-1-414/45, Srinivasa Nagar (East.),S.R. Nagar, Hyderabad.
2 Shri K.Sri Ram, S/o. K.Narasimha Murthy, H.No.12-2-823, 13/43, Income Tax Colony, Mehdipatnam, Hyderabad.

**.....RESPONDENTS**

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ of certiorari or any other appropriate writ, order or direction, calling for the records, pertaining to OA No.264 of 2003 Dated:19-6-2003 on the file of Hon'ble Central Administrative Tribunal, Hyderabad Bench, Hyderabad and quash the same as illegal, arbitrary, contrary to law and unconstitutional and declare the same as void ab initio, null and void and nonest in the eye of law.

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**WRIT PETITION NO : 24325 of 2003**

Between:

1. The Principal Accountant General, Andhra Pradesh, Saifabad,

Hyderabad.
2. The Comptroller and Auditor General of India, Bahadur Shah Zafar

Marg, New Delhi.

**..... PETITIONERS**

AND

Mohd. Alaf Khan, S/o. Mohd. Hazarat Khan, Senior Auditor, Office of the Principal Accountant General (Audit), Andhra Pradesh, Hyderabad,
H.No. 9-4-62/86, Nizam Colony, Toli Chowki, Hyderabad - 08.

**.....RESPONDENTs**

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to

issue a Writ of Certiorari or any other appropriate Writ, Order or direction, calling for the records, pertaining to O.A.No.711 of 2003, dated 23.07.2003 on the file of Hon'ble Central Administrative Tribunal, Hyderabad Bench, Hyderabad and quash the same as illegal, arbitrary, contrary to law and unconstitutional and declare the same as void ab initio, null and void and non est in the eye of law.

Counsel for the Petitioners: MR.A.RAJASHEKAR REDDY

(In all the writ petitions) Senior Central Government Standing Counsel

Counsel for the Respondents: Mr.G.VIDYA SAGAR, Advocate

(In all the writ petitions) for Mr.P.V.P.Mrutyunjaya Rao, Advocate

**The Court made the following :**

**THE HON'BLE SRI JUSTICE BILAL NAZKI**

**THE HON'BLE SRI JUSTICE V.V.S.RAO**

**AND**

**THE HON'BLE SRI JUSTICE P.S.NARAYANA**

**WRIT PETITION Nos.22042, 24191, 24308, 24324**

**and 24325 of 2003**

**COMMON JUDGMENT:** (per the Hon'ble Sri Justice V.V.S.Rao)

**Introduction**

These Writ Petitions are filed by the Principal Accountant General of Andhra Pradesh and the Comptroller and Auditor General of India, New Delhi, assailing the judgments and orders of the Central Administrative Tribunal, Hyderabad Bench in different Original Applications moved under Section 19 of the Administrative Tribunals Act, 1985. In all the judgments, the learned Tribunal followed its earlier judgment in O.A.No.401 of 1992, dt.2.12.1992 [**P. Yellamanda v. Comptroller and Auditor General of India**] (hereafter called, **Yellamanda case**), a Division Bench judgment of this Court in **Union of India v. R.Malakondaiah** (hereafter called, **Malakondaiah case**), which followed the Judgment of the Supreme Court in

**S.Banerjee v. Union of India** (hereafter called, **Banerjee case**). These matters were initially placed before a Division Bench of this Court. It was submitted by the petitioners' counsel before the said Bench that the decision of the Supreme Court in **Banerjee case** is not applicable and that the decision of this Court in **Malakondaiah case** requires reconsideration. Therefore, it was felt that an authoritative pronouncement is required in the matter and accordingly, the Division Bench referred the matters to Full Bench. That is how the matters are placed before this Full Bench. This common judgment shall dispose of all these five Writ Petition.

**Background Facts**

To understand the controversy, it is necessary to refer to the fact of the matter in Writ Petition No.22042 of 2003. The sole respondent retired as Senior Audit Officer in the Office of the first petitioner on 31.12.2001 afternoon. He was paid death-cum-retirement gratuity (DCRG) on the basis of his last drawn pay of Rs.9,925/- plus D.A. at the rate of 45%. His increment was due on 1.1.2002. But, the same was not sanctioned and therefore, it was not reckoned for the purpose of calculating the pension, DCRG and other benefits. After accepting these benefits, the respondent made a representation on 11.3.2002 to the first petitioner – Principal Accountant General (Audit) requesting to sanction increment of Rs.275/- which fell due on 1.1.2002. By communication dt.2.4.2002, first petitioner rejected the claim of the respondent informing that the respondent is not eligible for increment with effect from 1.1.2002 as his pay was fixed under proviso to Note-I below of Rule 34 of Central Civil Services (Pension) Rules, 1972 (hereafter called, the Pension Rules). Assailing the communication dt.2.4.2002 of the first petitioner, the respondent filed O.A.No.797 of 2002 before the learned Tribunal. The respondent prayed to set aside the orders of first petitioner and for a consequential direction to revise pensionary benefits of the respondent by granting benefit of increment due on 1.1.2002 and the D.A. instalments sanctioned by the Government of India raising D.A. from 45% to 49%. The respondent mainly relied on the judgment of the Supreme Court in **Banerjee case** and earlier decision of learned Tribunal in **Yellamanda case**, the judgment of Division Bench of this Court in **Malakondaiah case** and the decision of the Principal Bench of the Central Administrative Tribunal, New Delhi in **M/s.Kamala Gupta v. Commissioner, Kendriya Vidyalaya Sanghatan.**

The petitioners herein contested the claim of the respondent by filing reply statement. They urged that the decision of the learned Tribunal in **Yellamanda case** and the decision of the Division Bench of this Court in **Malakondaiah case** are judgments *in personam* and therefore they have no general applicability. They also contended that the respondent having retired on 31.12.2001 ceased to be in Government service with effect from that date, that the respondent was a pensioner with effect from 1.1.2002 and that he was not entitled for any emoluments with effect from 1.1.2002 by reason of which no increment need be paid to him.

**Commonality in all cases**

In all these matters, as in W.P.No.22042 of 2003, the respondent employees retired

from the office of the Principal Accountant General on the last date of month. Their increment was due on the first day of the succeeding month after retirement. In all the matters, the respondents placed reliance on the earlier judgment of the learned Tribunal in **Yellamanda case** and Division Bench Judgment of this Court in **Malakondaiah case**. The following table gives date of retirement and date on which increment was due.

| Sl.No. | Respondent/s in W.P.No. | Retired on | Incrementdue on |
|---|---|---|---|
| 1. | 22042 of 2003 | 31.12.2001 | 1.1.2002 |
| 2. | 24191 of 2003 | 30.6.1994 | 1.7.1994 |
| 3. | 24308 of 2003 -R.1 -R.2 | 31.5.199728.2.1990 | 1.6.19971.3.1990 |
| 4. | 24324 of 2003 - R.1 - R.2 | 31.7.199531.7.1994 | 1.8.19951.8.1994 |
| 5. | 24325 of 2003 | 30.6.1996 | 1.7.1996 |

**The Impugned Order of the Tribunal**

The Central Administrative Tribunal considered the question whether a respondent employee is entitled to get increment that falls due on the next date of retirement when the respondent was in service till the last date of the preceding month. The learned Tribunal also considered the question whether the respondent is entitled to get D.A. installments at 49% of pay as claimed by the applicant.

On first question, the learned Tribunal placed reliance on the Division Bench judgment of this Court in **Malakondaiah case** as well as the judgment of the learned Tribunal in **Yellamanda case** and held that the respondent by virtue of his service for a continuous period of one year had earned one increment and he has right for benefit of increment and that the respondent is entitled to get annual increment due to him that fell due on the first date of the month after retiring month. On the second question, the learned Tribunal relied on Rule 5(2) of the Pension Rules, the judgment of the Supreme Court in **Banerjee case** and recorded a finding that though the respondent retired on the last date of the month viz., 31.12.2001 as in W.P.No.22042 of 2003, his date of retirement has to be treated as 1.1.2002 by reason of which the respondent is entitled for enhanced D.A. at 49% of pay. Accordingly, the learned Tribunal allowed the Original Application filed by the respondent therein, and issued a direction to the petitioners to release annual increment due on 1.1.2002 and grant all consequential retiral benefits to the respondent along with D.A. as per the entitlement treating date of retirement as 1.1.2002.

**Submissions made on behalf of the petitioners**

Learned Senior Central Government Standing Counsel,
Sri A.Rajasekhar Reddy, appearing for the petitioners, submits that ‘increment’ in a time-scale of pay is sanctioned to a Government servant on rendering qualifying a service of twelve months. Accepting the recommendations of Third Pay Commission, the Government of India simplified the procedure for sanctioning

increment allowing the increment from the first month in which it falls due. As per Fundamental Rule (F.R.) 56 every Government servant shall retire from service on the last day of the month in which he attains the age of superannuation irrespective of the actual date of completing 60 years of age. Relying on Rule 5(2) of the Pension Rules, he contends that the day on which the Government servant retires shall be treated as his last working day. Thus, the Government servant, who is on the verge of retirement is allowed concessions in the matter of drawal of increment, and in the matter of date of increment. If a retired Government servant is allowed to draw another increment after retirement, it would be contrary to Pension Rules as well as Fundamental Rules. He would then urge that as per F.R.26, an increment can be drawn only when an employee is on duty and an employee who retires on the last working day of the month ceases to be Government employee and therefore no increment can be sanctioned to him. The Government servants were not on duty on first of the month succeeding the date of retirement and therefore sanction of increment is inadmissible. Lastly, he submits enhanced rate of D.A. came into effect on 1.1.2002 and the Government servant who retires prior to that date is not entitled for payment of enhanced rate of D.A. He would urge that the decision of the Supreme Court in **Banerjee case** has no application to the controversy in these cases.

**Submissions made on behalf of Respondents**

Learned counsel for respondents, Sri G.V.Vidya Sagar, submits that though a Government servant retires on the last working day of the month, such Government servant for the purpose of increment, pension, and gratuity and payment of revised rate of D.A. is deemed to be in service on the first of the succeeding month. Therefore, all the respondents are entitled for annual increment, which is due on the first of the succeeding the month in which the Government servant retired. He would place reliance on Rule 83 of the Pension Rules, besides placing strong reliance on the decision of the Supreme Court in **Banerjee case** and Division Bench judgment of this Court in **Malakondaiah case**. Learned counsel also placed reliance on a decision of the Full Bench of Central Administrative Tribunal, Mumbai Bench, in **Venkatram Rajagopalan v. Union of India** [in O.A.Nos.459 and 460 of 1997, dt.15.10.1999] in support of the contention that a Government servant who retires on last day of the preceding month is deemed to have effectively retired from service with effect from first day of succeeding month. Therefore, the learned counsel contends that all the respondents are entitled for increment, which falls due on next day after retirement.

**Points for consideration**

The two points that fall for consideration are,

I. Whether a Government servant who retires on the last working day of the preceding month and whose annual increment falls due on the first of the succeeding month is entitled for sanction of annual increment for the purpose of pension and gratuity?

II. Whether a retired Government servant is entitled for revised rate of D.A. which comes into force after such Government servant retires from service on attaining the age of superannuation?

**In Re Point No.(I)**

***Whether a Government servant who retires on the last working day of the preceding month and whose annual increment falls due on the first of the succeeding month is entitled for sanction of annual increment for the purpose of pension and gratuity?***

Pension is invisible accumulated savings of a Government servant while in service. It is not paid as gratis or a bounty. A Government servant earns pension while discharging the functions as a Government servant. It is, however, not subject to whims and fancies of the Government nor arbitrary grant of monthly post retiral payment. Every Government servant who attains the age of superannuation - unless it is withheld as a measure of punishment; is entitled for pension after retirement at a rate prescribed by Rules and Regulations. Generally, the amount of pension is fixed taking into consideration the emoluments paid to a Government servant in the last year or part of last year of his service as such Government servant.

The Government service is not a contract. It is a status recognised by Constitution of India and governed by the Rules made by the President under the proviso to Article 309 of the Constitution of India. These have force of law. Under these Service Rules, consideration for service rendered by a Government servant is the remuneration payable to him commonly known as 'pay' during the tenure of employment. Again, the Rules or administrative instructions govern the pay paid to a Government servant periodically; once in a calendar month. The pay of a Government servant may consists of substantial pay, special pay, additional pay, personal pay, and presumptive pay. The pay of a Government servant does not remain static and Government periodically gives an increase in pay after completion of one year of service, which in service parlance referred to as "increment". The increments as we presently see are generally given annually in a routine manner to officers with good conduct unless such increments are withheld as a measure of punishment or linked with efficiency in which event after certain period of service the Government servant could not be given any increment on the ground of "efficiency bar". The grant of increment depends on and is linked to the efficiency of a Government servant to be of utility in the continued service.

Keeping in view some of the relevant service law principles mentioned herein above, a reference has to necessarily be made to the relevant Rules, which fall for consideration. First set of Rules is Fundamental Rules applicable to all Central Government Servants. Second set of Rules is Central Civil Services (Pension) Rules, and thirdly Civil Services Regulations. We propose to examine the issue with reference to Fundamental Rules and Pension Rules separately and view the controversy in *juxta position* of all these Rules.

**Fundamental Rules**

Fundamental Rules are core Rules governing all general conditions of service like pay, leave, deputation, retirement and dismissal, removal and suspension. All Central Government employees are governed by these Rules. If there are special Rules governing a particular "service" and in event conflict with Fundamental Rules, Special Rules would prevail, for *generalia specialibus non derogant.*

F.R.9 contains definitions of the terms used in Fundamental Rules. F.R. 9(6), (21) and (31) define the terms 'duty', 'pay' and 'time-scale of pay', which read as under.

9(6). **"Duty"** – (a) Duty includes –

i. service as a probationer or apprentice provided that such service is followed by confirmation; and

ii. joining time.

(b) A Government servant may be treated as on duty –

i. during a course of instruction or training in India, or

ii. in the case of a student, stipendiary or otherwise, who is entitled to be appointed to the service of Government on passing through a course of training at a University, College or School in India, during the interval between the satisfactory completion of the course and his assumption of duties.

9(21). **"Pay"** – (a) Pay means the amount drawn monthly by a Government servant as –

i. the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and

ii. overseas pay, special pay and personal pay; and

iii. any other emoluments which may be specially classed as pay by the President.

(b) Not printed.

(c) Not printed.

9(31). **"Time-scale of pay"** –

a. Time-scale of pay means pay which, subject to any condition prescribed in these rules, rises by periodical increments from a minimum to a maximum. It includes the class of pay hitherto

known as progressive.

b. Time-scales are to be identical if the minimum, the maximum, the period of increment and the rate of increment of the time-scales are identical.

c. A post is said to be on the same time-scale as another post on a time-scale if the two time-scales are identical and the posts fall within a cadre, or a class in a cadre, such cadre or class having been created in order to fill all posts involving duties of approximately the same character or degree of responsibility, in a service or establishment or group of establishments, so that the pay of the holder of any particular post is determined by his position in the cadre or class and not by the fact that he holds that post.

Chapter–III of the Fundamental Rules contains "General conditions of service". Chapter–IV deals with "Pay" whereas Chapter–IX deals with "Retirement". F.R.17. and F.R.56 insofar as they are relevant read as under:

**F.R.17.** (1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence.

(2) The date from which a person recruited overseas shall commence to draw pay on first appointment shall be determined by the general or special orders of the authority by whom he is appointed.

**F.R. 56.** (a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Government servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years.

Provided further that a Government servant who has attained the age of fifty-eight years on or before the first day of May, 1998 and is on extension in service, shall retire from the service on expiry of his extended period of service, or on the expiry of any further extension in service granted by the Central Government in public interest, provided that no such extension in service shall be granted beyond the age of 60 years.

(b) A workman who is governed by these rules shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years.

As per F.R.17, extracted hereinabove, a Government servant shall begin to draw the pay and allowances attached to his post with effect from the date when he assumes the duties of that post until he ceases to discharge those duties. “Pay” as defined in F.R.9(21)(a) means, the amount drawn monthly by a Government servant which also includes the increment given at an anterior date. Therefore, after retirement, a person will not be entitled to any pay including the increment that may be due from the posterior date. F.R.22 regulates the initial pay of a Government servant who is appointed to a post in time-scale and F.R.24 and F.R.26 regulate the sanction of increment to a Government servant, who is on duty. A reading of various Fundamental Rules extracted hereinabove would show that a person appointed as a Government servant is entitled to pay in time- scale of pay. He is also entitled to draw the increment as per time-scale of pay as a matter of course as long as such Government servant discharges duties of the post and such Government servant shall not be entitled to draw the pay and allowances attached to the post as soon as he ceases to discharge those duties. In other words, as per F.R.17 read with F.Rs.24 and 26 annual increment is given to a Government servant to enable him to discharge duty and draw pay and allowances attached to the post. If such Government servant ceases to discharge duties by any reason say, by reason of attainment of age of superannuation, such Government servant will not be entitled to draw pay and allowances. As a necessary corollary, such employee would not be entitled to any increment if it falls due after the date of retirement, be it on the next day of retirement or sometime thereafter.

F.R.56(a) creates a legal fiction. Even if a person attains the age of 60 years on any day of the month, he shall be retired on the afternoon of the last day of the month. A Government servant, who attains the age of 60 years on any day in a month, is deemed to have not attained the superannuation till the last day of the month. In the case of a Government servant, whose date of birth is first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of 60 years. In this case, actually and factually, a Government servant would have completed the age of 60 years a day before the date on which his date of birth falls. Therefore, there are two situations. In the first situation, a Government servant though he attains the age of 60 years on any day of the month, he is deemed to have not attained such age till the afternoon of the last day of that month. Assuming that such a situation is not contemplated - as in the case of persons holding constitutional offices like, Judges of Supreme Court, High Court, Members of Election Commission, Comptroller and Auditor General etc; if a Government servant is retired on a day before the actual date of birth on any day of the month and the increment of such Government servant falls on the first of the succeeding month, can he claim annual grade increment? The answer must be an emphatic “no”. Because, by the date on which the increment falls due, such Government servant ceased to be a Government servant. It is therefore logical and reasonable to conclude that merely because for the purpose of F.R.56(a), a person is continued till the last date of the month in which he attains the age of superannuation, such an employee cannot claim increment which falls due on the first day of the succeeding month after retirement.

In second situation, a Government servant, who is covered by the proviso to F.R.56, that is to say, whose date of birth is first of a month, such employee has to retire on the last day of the preceding month. In Courts' considered opinion, no distinction can be made in both the cases, as the Government servants retired on the last day of the month and with effect from first day of succeeding month ceases to discharge Government duties and no pay is payable. If an increment is denied to a Government servant falling under F.R.56(a) though he retires on the last day of the month, the same principle will have to be applied to a Government servant falling under first proviso to F.R.56. Such interpretation would sub-serve the principle of equality and has to be preferred to any other possible and plausible method of interpretation. It is well settled that a provision of law has to be interpreted in a non-discriminatory manner in tune with principle of equality before law and equal protection of laws enshrined in Article 14 of the Constitution of India (See in **K.P.Vargese v. I.T.Officer, Ernakulam**). Yet another situation is where the date of birth of a Government servant falls on the last day of the month. In such a case, he has to necessarily retire on the same day on which his date of birth falls and even if his increment falls on the first day of the succeeding month, he would not be entitled for any annual increment.

**Central Civil Services (Pension) Rules**

Central Civil Services Pension Rules are promulgated in 1972 in exercise of power under proviso to Article 309 of the Constitution of India. These Rules, as mentioned earlier, in the absence of any legislation made by the Parliament of India under Article 309 of the Constitution of India, have force of law and all the principles of interpretation that are applicable to a statute would equally apply while interpreting these Rules. Indeed, as per Section 3 read with clauses (50) and (51) of Section 3 of General Clauses Act, 1897, the provisions thereof apply to Pension Rules also. The learned counsel for the petitioners placed strong reliance on Rules 5, 33, 34 and 35 of the Pension Rules and the Notes below the said Rules. Before noticing this, it is also necessary to notice some of the definitions as explained by Rule 3 of the Pension Rules. Clauses 1(b) (e) and (q) define the terms relevant for the purpose and read as under.

> 1(b) '**Average Emoluments**' means average emoluments as determined in accordance with Rule 34;
>
> 1(e) '**Emoluments**' means emoluments as defined in Rule 33;
>
> 1(q) '**Qualifying Service'** means service rendered while on duty or otherwise which shall be taken into account for the purpose of pension and gratuities admissible under these rules;

As can be seen, the definition clause does not give the comprehensive definition of these terms. One has to necessarily refer to Rules 14, 33 and 34 of the Pension Rules for appreciating the terms “qualifying service”, “emoluments” and “average emoluments” for the purpose of pension. These Rules may be noticed.

**14. Conditions subject to which service qualifies**

(1) The service of a Government servant shall not qualify unless his duties and pay are regulated by the Government, or under conditions determined by the Government.

(2) For the purposes of sub-rule (1), **the expression “service” means service under the Government and paid by that Government from the Consolidated Fund of India or a Local Fund administered by that Government but does not include service in a non-pensionable established unless such service is treated as qualifying service by that Government.**

(3) In the case of a Government servant belonging to a State Government, who is permanently transferred to a service or post to which these rules apply, the continuous service rendered under the State Government in an officiating or temporary capacity, if any, followed without interruption by substantive appointment, or the continuous service rendered under that Government in an officiating or temporary capacity, as the case may be, shall qualify:

Provided that nothing contained in this sub-rule shall apply to any such Government servant who is appointed otherwise than by deputation to a service or post to which these rules apply.

(emphasis supplied)

**33. Emoluments**

The **expression ‘emoluments’ means basic pay** as defined in Rule 9(21)(a)(i) of the Fundamental Rules **which a Government servant was receiving immediately before his retirement or on the date of his death**; and will also include non-practising allowance granted to medical officer in lieu of private practice.

EXPLANATION – Stagnation increment shall be treated as emoluments for calculation of retirement benefits.

NOTE 1 – If a Government servant immediately before his retirement or death while in service had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn had he not been absent from duty or suspended shall be the emoluments for the purposes of this rule:

**Provided that any increase in pay (other than the increment referred to in Note 4) which is not actually drawn shall not form part of his emoluments.**

NOTE 2 – Where a Government servant immediately before his retirement or death while in service had proceeded on leave for which leave salary is payable after having held a higher appointment, whether in an officiating or temporary capacity, the benefit of emoluments drawn in such higher appointment shall be given only if it is certified that the Government servant would have continued to hold the higher appointment but for his proceeding on leave.

NOTE 3 – If a Government servant immediately before his retirement or death while in service had been absent from duty on extraordinary leave or had been under suspension, the period whereof does not count as service, the emoluments which he drew immediately before proceeding on such leave or being placed under suspension shall be the emoluments for the purposes of this rule.

**NOTE 4 – If a Government servant immediately before his retirement or death while in service, was on earned leave, and earned an increment which was not withheld, such increment, though not actually drawn, shall form part of his emoluments.**

Provided that the increment was earned during the currency of the earned leave not exceeding one hundred and twenty days, or during the first one hundred and twenty days of earned leave where such leave was for more than one hundred and twenty days.

NOTE 5. – Deleted

NOTE 6. – Pay drawn by a Government servant while on deputation to the Armed Forces of India shall be treated as emoluments.

NOTE 7. – Pay drawn by a Government servant while on foreign service shall not be treated as emoluments, but the pay which he would have drawn under the Government had he not been on foreign service shall alone be treated as emoluments.

NOTE 8.- Where a pensioner who is re-employed in Government service elects in terms of Clause (a) of sub-rule (1) of Rule 18 or Clause (a) of sub-rule (1) of Rule 19 to retain his pension for earlier service and whose pay on re-employment has been reduced by an amount not exceeding his pension, the element of pension by which his pay is reduced shall be treated as emoluments.

NOTE 9. – Deleted.

NOTE 10. – When a Government servant has been transferred to an autonomous body consequent on the conversion of a Department of the Government into such a body and the Government servant so transferred opts to retain the pensionary benefits under the rules of the Government, the emoluments drawn under the autonomous body shall be treated as emoluments for the purpose of this rule.

(emphasis supplied)

**34. Average Emoluments**

**Average emoluments shall be determined with reference to the**

**emoluments drawn by a Government servant during the last ten months of his service.**

NOTE 1 – If during the last ten months of his service, a Government servant had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn had he not been absent from duty or suspended shall be taken into account for determining the average emoluments:

**Provided that any increase in pay (other than the increment referred to in Note 3) which is not actually drawn shall not form part of his emoluments.**

NOTE 2 – If, during the last ten months of his service, a Government servant had been absent from duty on extraordinary leave, or had been under suspension the period whereof does not count as service, the aforesaid period of leave or suspension shall be disregarded in the calculation of the average emoluments and equal period before the ten months shall be included.

**NOTE 3 – In the case of a Government servant who was on earned leave during the last ten months of his service and earned an increment, which was not withheld, such increment though not actually drawn shall be included in the average emoluments:**

Provided that the increment was earned during the currency of the earned leave not exceeding one hundred and twenty days or during the first one hundred and twenty days of earned leave where such leave was for more than one hundred and twenty days.

(emphasis supplied)

Here, we may also read Rule 5 of the Pension Rules.

**5. Regulation of claims to pension or family pension**

(1) Any claim to pension or family pension shall be regulated by the provisions of these rules in force at the time when a Government servant retires or is retired or is discharged or is allowed to resign from service or dies, as the case may be.

(2) The day on which a Government servant retires or is retired or is discharged or is allowed to resign from service, as the case may be, shall be treated as his last working day. The date of death shall also be treated as a working day.

Provided that in the case of a Government servant who is retired prematurely or who retires voluntarily under Clauses (j) to (m) of Rule 56 of the Fundamental Rules or Rule 48 or Rule 48-A, as the case may be, the date of retirement shall be treated as a non-working day.

**Civil Service Regulations**

In **Malakondaiah case** (supra), on which reliance was placed before the learned Tribunal, the Government of India relied on Article 151 of the Civil Service Regulations. It is, therefore, necessary to refer to some of the Articles in Civil Service Regulations (hereafter called, CS Regulations).

Historically Government of India Act 1919 by Sections 96-B(2) empowered the Secretary of State for India to make Rules regarding conditions of service of Government servants. In exercise of these powers, Fundamental Rules and Civil Service (CCA) Rules were made some time in 1922. As mentioned earlier, Fundamental Rules, especially in relation to general conditions of service, like, pay, leave, deputation, retirement, dismissal, removal and suspension apply to all Government servants whose pay is debitable to civil estimates. Before the promulgation of Fundamental Rules, Government of India made various Rules and Regulations in relation to salary, leave, pension and travelling allowance of Government servants. These Rules/Regulations were published by authority compendiously as Civil Service Regulations. After inauguration of Constitution of India, though President of India promulgated different kinds of Rules under the proviso to Article 309 of the Constitution of India as well as Special Rules governing All India Services and Railway Servants, Civil Service Regulations continued to be applied by various departments in respect of conditions of service, if they are not inconsistent with the Rules made under the proviso to Article 309 of the Constitution of India or relevant Statutes. It is not denied before this Court that in all the Central Government Departments and Wings, Civil Service Regulations continued to be referred to and followed. There are as many as 1163 Articles or Regulations dealing with pay, allowance, leave and pension. Chapter-II contains definitions of terms like “Age” (Article 14), “Calendar Month” (Article 18), “Progressive Appointment” (Article 43) and the like.

As per Article 14, when an officer is required to retire on attaining a specified age, **the day on which he attains that age** is reckoned as non-working day and the officer must retire with effect from and including that day. Article 18 defines “Calendar Month” and also gives examples for reckoning the period of six months beginning on 28$^{th}$ February, 31$^{st}$ March, 1$^{st}$ April etc. The last day on which thirty days is completed is taken as the completion of the period of the Calendar Month. Regulation 43 defines “Progressive Appointment” to mean as an appointment the pay of which is progressive, that is, pay which, subject to the good behaviour of an officer, rises, by periodical increments, from a minimum to a maximum. Articles 151 to 154 deal with accrual of increment and it would be better to read Articles 151 to 153.

> **151. An increment accrues from the day following that on which it is earned.**
>
> Exception.- An officer appointed in England by the Secretary of State for service in India receives the increment in his pay in accordance with the

terms of his engagement.

(emphasis supplied)

152. A periodical increment should not be granted to an officer serving on Progressive pay, as a matter of course, or unless his conduct has been good. When an increment is withheld, the period for which it is withheld is at the discretion of the authority having power to withhold, who will also decide whether the postponement is or is not to have the effect of similarly postponing future increments. The authority having powers to withhold is, in the case of ministerial and menial officers, the head of the office, and in the case of other officers, the Local Government, which may delegate the powers to heads of departments or other supervising officers.

153 (a). A proposal to grant an increment of Progressive pay in advance of the due date should always be scrutinized with special jealousy: **it is contrary to the principle of Progressive pay to grant an increments before it is due, and such a grant should not be recommended or allowed,** excepting under circumstances which would justify a personal allowance to an officer whose pay is fixed, -- that is to say, seldom if ever.

(b) The powers of the Government of India, of Local Governments and of subordinate authorities to grant a premature increment to an officer are subject to the limits upto which each such authority can raise the officer's remuneration.

(emphasis supplied)

Thus a person who gets progressive appointment would be entitled to a periodical rise in the pay subject to good behaviour and such increment accrues from the day following that on which it is earned. That is to say, a Government servant would get and draw increment after completion of one year. If the day for payment of annual increment is first of January, a Government servant would be entitled for annual increment on 31$^{st}$ December of that year, but the same would accrue only from First January of next year if such Government servant continues to be in progressive appointment. The words "Progressive Appointment" are crucial in understanding the question as to whether a person who retires would be entitled for payment of annual increment in Progressive Pay.

As held by us when conditions of service are governed by Rules promulgated under proviso to Rule 309, unless there is some unoccupied area, the Statutory Rules alone are applicable. As per the "Pension Rules" Government Servants Pension is regulated by these Rules and therefore we are not referring to Articles 348A to Articles 531 of the CS Regulations which deal with "pension". We have referred to relevant Articles in CS Regulations dealing with increment only.

**Findings in relation to Rules and Regulations**

A conspectus of the above Rules would lead to the following. A Government servant's qualifying service would commence from the date he takes charge of the

post to which he is first appointed either substantially or in an officiating or temporary capacity (see Pension Rule 13). The same is however subject to Rule 14, which is to the effect that the service of a Government servant shall not qualify unless his duties and pay are regulated by the Government or under conditions determined by the Government. That is to say as long as a Government servant continued to be a Government servant and paid from the consolidated fund of India or local fund administered by the Government, he cannot be said to be on duty.

A Government servant, as per Rule 35, shall be granted superannuation pension on his attaining age of compulsory retirement. Such Government servant shall be paid pension based on the qualifying service and based on the average emoluments drawn during the last ten months of his service. For the purpose of qualifying service and calculating average emoluments, one has to look to Rule 5 and Rule 34 of the Pension Rules. Rule 5(2) mandates that the day on which a Government servant retires shall be treated as his last working day. Reading Rule 5(2), Rules 33 and 34 of the Pension Rules, the conclusion is irresistible that a Government servant is said to be on duty entitled for emoluments till his last working day when he would retire and thereafter a person ceases to be Government servant. After a Government servant retires on his last working day, such Government servant would not be entitled to any pay or any other benefits connected with pay.

As per Explanation to Rule 33 of the Pension Rules, only stagnation increment shall be treated as emoluments for calculation of retirement benefits and as per Rule 34, emoluments drawn by Government servant during the last ten months of his service are treated as emoluments. But any increase in pay, which is not actually drawn shall not form part of average emoluments, though as per Note 4 below Rule 33 and Note 3 below Rule 34, increment earned during earned leave during last ten months though not actually drawn shall form part of average emoluments. Except in the case increment earned during earned leave, no other increase can be treated as pay while determining “average emoluments”. This is made clear by proviso to Note I below Rule 33 and Rule 34. It lays down that any increase in pay which is not actually drawn shall not form part of emoluments of Government servant.

Rule 33 used the phrase “pay which Government servant was receiving immediately before retirement”, and proviso to Note 1 of Rule 33 employs words “pay not actually drawn” and Rule 34 uses phrase “emoluments drawn by a Government servant during the last ten months of service” shall be average emoluments. Similar language is used in proviso to Note 1 of Rule 34. The ‘past tense’ used in these provisions would show whatever is not actually drawn cannot form part of average emoluments for the purpose of pension. This by necessary implication mean that increment which falls due and payable after retirement cannot be considered for determining average emoluments for the purpose of pension as it would be “increase of pay” which is not drawn and which is not paid. This legal position is further made clear by Rules 35, 36 38, 39 and 40 and Rule 83 of the Pension Rules. Rule 83 of the Pension Rules deals with the date from which pension becomes payable and reads as under.

**83. Date from which pension becomes payable**

(1) Except in the case of a Government servant to whom the provisions of Rule 37 apply and subject to the provisions of Rules 9 and 69, a pension other than family pension shall become payable from the date on which a Government servant ceases to be borne on the establishment.

(2) Pension including family pension shall be payable for the day on which its recipient dies.

In plain terms, Rule 83 of the Pension Rules postulates that pension shall become payable from the date on which a Government servant ceases to be borne on the establishment. That only means a Government servant gets the status of pensioner from the next day after date of retirement i.e. last day of the month on which he is retired.

As per Article 151 of CS Regulations, annual increment payable to a Government servant will accrue from the day following that day on which it is earned. The Government servant would get a right for annual increment only after conclusion of the year and therefore on the day when the increment falls due, it would not become payable, but it would become payable only from the next day. In a given case, if by reason of Rule 5 of the Pension Rules read with F.R. 56 if a Government servant retires on the last day of the month, his annual increment falls due on the next day, the same would become payable only from second day of the month in which the increment falls due. In that view of the matter as well, all the Government servants in these batch cases would not be entitled to claim any increment as they ceased to be Government servants on the mid-night of the last day of the month in which they attain the age of superannuation.

**When one ceases to be Government servant**

In the backgrounds of the Rules, the next question is, when a Government servant ceases to be borne on the establishment. This is relevant because as long as a Government servant continues to be on duty, the service is counted towards qualifying service and the moment he ceases to be a Government servant, such service cannot be counted. When a person retires on the last working day of the month on attaining age of superannuation? When he would cease to be a Government servant and when pension becomes payable? Whether a Government servant retiring on the last working day of the month is entitled to draw “increment” falling due on the next day or on the first day of the month after the month of retirement? When Government servants cease to be borne on the establishment?

We have referred Fundamental Rules as well as Pension Rules. These Rules in no uncertain terms laid down that when a Government servant retires, the day on which he retires shall be treated as his last working day and that the average emoluments during the last ten months i.e. ten months prior to last working day shall be treated as average emoluments for the purpose of superannuation pension paid

according to qualifying service. This only means that service rendered from the date on which Government servant takes charge to the last working day as per Rule 5(2) of the Pension Rules. The submission of the learned counsel for the respondents is that even when a Government servant retires on the last working day of the month, he should be deemed to have retired on the first day of the month for the purpose of all benefits including pension. Reliance is placed on the decisions of the Supreme Court in **Banerjee case** and the Division Bench judgment of this Court in **Malakondaiah case.** Reliance is also placed on the decision of the Division Bench of Kerala High Court in **Union of India v. George**. Before we consider these cited cases and also other case law, we may refer to the principles of law regarding 'commencement and termination of time'.

**Commencement and Termination of Time**

In common law, for the purpose of determining the rights and duties, the concept of unit(s) time of that is an "Hour", "Day", "Week", "Month" and "Year" and the like. These have been interpreted in ways more than one depending on (i) contextual situation, (ii) *concensus ad idem* between/among contracting parties; and (iii) general perception of the concept of time. General Clauses Act, 1897 defines various terms used for indicating time in the past, present and future. Some of the enactments made by Parliament as well as State Legislatures also define the various terms in relation to 'time'. Almanac is part of common law in England and it was recognised in England by a Statute in 1662. Halsbury's Laws of England devotes entire chapter (paragraphs 201 to 300) for this subject. Paragraphs 212, 213 and 214 give the description of 'Week', 'Day' and 'Hour' in the following manner. They read as under.

> **212. Week.** A week is strictly **the time between midnight on Saturday and the same hour on the next succeeding Saturday**, but the term is also applied to any period of seven successive days. There is no equivalent, when calculating periods of weeks, of the corresponding date rule used in construing periods of months.
>
> (emphasis supplied)

> **213. Day and night.** The term 'day' is, like the terms 'year' and 'month', used in more senses than one. **A day is strictly the period of time which begins with one midnight and ends with the next**. It may also denote any period of twenty-four hours, and again it may denote the period of time between sunrise and sunset. A 'business day' has been defined as any day except Saturday, Sunday or a bank holiday.

The term 'night' is also defined differently for different purposes.

(emphasis supplied)

> **214. Hour.** 'Hour' may mean any one of the 24 parts of a day or any period

> of 60 minutes. 'Hours' may be used loosely as meaning a period of time, as in the phrase 'hours of darkness'.

A 'day' begins with one mignight and ends with the next midnight and denotes a period of 24 hours, though generally persons not connected with legal interpretation assume that a day denotes the period of time between sunrise and sunset. A 'month' means a calendar month and what would be the inference to be drawn when a calendar month runs from arbitrary date. For instance, if a worker has to complete the work in one month, from any day in the month other than first of the month, one month has to be calculated according to calendar month till the expiry of thirty days or thirty-one days as the case may be. In Halsbury's Laws of England, this is described as under.

> **211. Calendar month running from arbitrary date.** When the period prescribed is a calendar month running from any arbitrary date the period expires upon the day in the succeeding month corresponding to the date upon which the period starts, save that, if the period starts at the end of a calendar month which contains more days than the next succeeding month, the period expires at the end of that succeeding month.
>
> If a period of one calendar month includes the last day of February there must be 29 or 28 days, according as the year is or is not a leap year.

A conspectus of these common law principles would show that a day commencing after zero hours in the midnight would come to an end with 12'O clock midnight the next day. If something has to be done or something has to be given effect to depending on the day such a thing has to be given effect to only till midnight of the day and not the next day commencing with after midnight. A week or a month or a year has to be reckoned as per this principle. However, for the calculation of month or a year, if starting day is excluded by statute or by agreement, a month or year comes to an end not with the completion of the day at midnight 12'O clock but with the completion of the day on the next succeeding day at midnight. For example, in the law of limitation, it is generally provided that the time is calculated for the purpose of availing a remedy, excluding the day on which a person is deemed to have knowledge of the grievance like obtaining a copy of the judgment or order of the legal forum about which grievance is made or the completion of event. Again this situation is not universal and interpretation of time for the purpose of limitation depends on the situation which gives rise to a cause of action. In the law of carriers, law of insurance and maritime law as well, the interpretation of "time" depends on the terms used in the contract and has great relevance in deciding the rights of the parties.

**General Clauses Act**

There is no gainsaying to mention that the Parliament enactments, rules and regulations made by Central Government are to be interpreted, in the light of the General Clauses Act. The Pension Rules and Fundamental Rules are the "law"

governing the conditions of service of Central Government employees and as mentioned earlier the General Clauses Act equally applies to these Rules. The term 'Day' is not defined in the General Clauses Act but Section 3(35) and 3(66) define 'Month' and 'Year' respectively. They read as under.

> **3(35)**: "month", shall mean a month reckoned according to the British Calendar.
>
> **3(66)**: "year" shall mean a year reckoned according to the British calendar.

Sections 9 and 10 of the General Clauses Act deal with 'commencement of time' and 'computation of time' respectively, which read as under.

> **9. Commencement and termination of time –** (1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "or".
>
> (2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.
>
> **10. Computation of time –** (1) Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open;
>
> Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.
>
> (2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887.

The common law principles as well as relevant provisions in General Clauses Act dealing with commencement and completion of the time as well as calculation of time – be it day, month or year – do not support the contention of the learned counsel for respondents that the next day after the date of retirement should also be considered for the purpose of granting annual increment deeming the next day as the day of the retirement. We have already held that a Government servant retiring on the last working day of the month shall be deemed to have ceased be Government employee with effect from mid-night of that day and immediately after commencement of the next day, i.e., after mid-night 12' O clock he becomes pensioner. Though he is paid pension, he shall not be deemed to be on duty as a

Government servant and therefore annual increment cannot be sanctioned to such retired Government servant.

**Findings in relation to Cases cited by Counsel**

A reference to decisions cited by counsel in some detail is necessary. In **Banerjee case,** the facts are these. Mr.S.Banerjee was permitted to retire voluntarily from the service of Registry of Supreme Court as Additional Registrar, with effect from forenoon of 1.1.1986. In the meanwhile, Fourth Central Pay Commission recommended revision of salaries and pension of the Government employees. In paragraph – 17.3 of report of Pay Commission it was recommended that in the case of employees retiring during the period from 1.1.1986 to 30.9.1986 Government may consider treating the entire D.A. drawn by them upto December, 31.12.1985 as pay for pensionary benefits. The claim for benefit of recommendation of the Pay Commission was not allowed in view of proviso to Rule 5(2) of the Central Pension Rules. The retiring employee then filed a Writ Petition before the Supreme Court under Article 32 of the Constitution of India. It was mainly contended by the Union of India that as per proviso to Rule 5(2) of the Pension Rules, the date of retirement i.e., 1.1.1986 should be treated as non-working day that he was not entitled for the salary for the day of the retirement and that he was not entitled for the benefit of recommendation of Pay Commission in paragraph 17.3 of the report.

The Supreme Court considered the question whether Banerjee has retired on 1.1.1986 and came to the conclusion that proviso to Rule 5(2) has no bearing when the employee cannot be said to have retired on 31.12.1985 (a concession was made to that effect by the Union of India) and that Banerjee must be held to have retired with effect from 1.1.1986. The Court categorically held that as soon as 1.1.1986 has commenced petitioner retired as he was retired from forenoon on that day. It cannot be said that he retired on 31.12.1985. The relevant observations read as under:

> It is true that in view of the proviso to Rule 5(2) of the Rules, the petitioner will not be entitled to any salary for the day on which he actually retired. But, in our opinion, that has no bearing on the question as to the date of retirement. Can it be said that the petitioner retired on December 31, 1985 ? The answer must be in the negative. Indeed, Mr.Anil Dev Singh, learned counsel appearing on behalf of the respondents, frankly conceded that the petitioner could not be said to have retired on December 31, 1985. It is also not the case of the respondents that the petitioner had retired from the service of this Court on December 31, 1985. Then it must beheld that the petitioner had retired with effect from January 1, 1986 and that is also the order of this Court dated December 6, 1985. **It may be that the petitioner had retired with effect from the forenoon of January 1, 1986 as per the said order of this Court, that is to say, as soon as January 1, 1986 had commenced the petitioner retired.** But, nevertheless, it has to be said that the petitioner had retired on January 1, 1986 and not on December 31, 1985. In the circumstances, the petitioner comes within the purview of paragraph 17.3 of the recommendations of the Pay Commission.

(emphasis supplied)

While the case was pending, the Union of India filed an additional affidavit bringing on record, Office Memorandum dt.14.4.1987 of Ministry of Personnel, Public Grievances and Pensions, Department of Pensions and Pensioners' Welfare. In the said Memorandum it was stated that pension of the Government servant is governed in terms of paragraphs 10.1, 10.2 and 11. Therefore, it was urged by Union of India Banerjee is not entitled for benefit under Office Memo, as Banerjee ceased to be in the employment in Supreme Court with effect from 1.1.986. Relying paragraph 3(1) of the Office Memorandum, dt.14.4.1987 the Supreme Court ruled as under:

> Paragraph 3.1 of the Office Memorandum provides, inter alia, that the revised provisions as per these orders shall apply to government servants who retire/die in harness on or after January 1, 1986. The said office memorandum will, therefore, be applicable to government servants retiring on January 1, 1986. There is, therefore, no substance in the contention that the office memorandum dated April 14, 1987 will not apply to the petitioner. Be that as it may, we have already held that the petitioner had retired with effect from January 1, 1986 and he comes within the purview of paragraph 17.3 of the recommendations of the Pay Commission.

As the decisions on this point cited before us mainly relied on **Banerjee case**, we have carefully perused the said judgment. In our opinion, judgment in **Banerjee case**, is not an authority for the proposition that an employee who retires on the last working day of the month is deemed to have retired on the first day of the succeeding month. The judgment of the Supreme Court has many distinguishing features. The case is that of an employee who sought voluntary retirement and governed by proviso to Rule 5(2) of the Pension Rules. The case pertains to conferment of the benefit of Fourth Pay Commission and Supreme Court itself had clearly said that the voluntarily retiring employee will not be entitled to any salary on the date of retirement as per proviso to Rule 5(2). Indeed, it supports the view that an employee retiring on the last working day of the month will not have any right to claim any salary from first of succeeding month. Further, a person is deemed to be retired on the day when such day commences and not after completion of the day.

I n **Venkatram Rajagopalan v. Union of India** (supra) the Tribunal was concerned with the question whether a Government servant completing the age of superannuation in the afternoon of 31.3.1995 is deemed to have retired from service on superannuation with effect from 31.3.1995 or with effect from 1.4.1996. F.R. 56 and Rules 35 and 83 of the Pension Rules were considered by the learned Tribunal. Rule 83(1) of the Pension Rules provided that pension of a superannuated Government servant shall become payable from the date on which Government servant ceased to be in the establishment. Having regard to the same, it was held that a Government servant completing the age of superannuation on 31.3.1995 (let us say on the last working day of the preceding month) is deemed to have effectively retired from service with effect from 1.4.1995 (let us say on the first day of

succeeding month). The learned Tribunal also noticed that the Office Memorandum of Government of India dt.14.7.1995 gave the benefit of increased death gratuity and retirement gratuity from Rs.1.00 lakh to Rs.2.50 lakhs in the case of Central Government employees who retire or die on or after 1.4.1995. Interpreting phrase "who retire or die on or after 1.4.1995", Full Bench of the learned Tribunal observed as under.

> According to Rule 83(1) of the Pension Rules, Pension becomes payable from **the date on which Government servant ceases to be born on the establishment** (emphasis given). A Government servant continues to be born on the establishment till midnight of the date of superannuation. The decision of the Hyderabad Bench of this Tribunal in T. Krishna Murthy's case (supra) cannot be brushed aside out by the Learned counsel for the respondents. Retirement may by voluntary or on superannuation. The principles for payment of pension will not vary on the basis of these distinctions. According to us, "afternoon of 31st of March" or "forenoon of 1st of April" means one and the same thing and on this basis also we see no reason to hold that the said case is not applicable to the present cases. In short, we are of the view that in the present cases the effective date of retirement would be 1.4.1995 and not 31.3.1995.

The Full Bench, in our considered opinion, came to the correct conclusion in laying down that Government servant retiring on last day of the preceding month is deemed to have become pensioner on the next day and therefore such pensioners also entitled for the benefit of enhanced gratuity. We fail to appreciate the contention of the learned counsel for respondents, that this decision has bearing on the question before us. This case does not in any manner assist the respondents. Indeed, it supports the view canvassed by the petitioners before us that a person retiring on the last day of the preceding month ceases to be borne on the establishment with effect from beginning of first first day of the succeeding month and he would not be entitled for payment of any emoluments as soon as first day of the succeeding month commences, i.e., after 12.00 'O' clock in the night.

The decision of the Division Bench of Kerala High Court in **Union of India v. George** (supra) is also brought to our notice. In the said judgment, the question before the Division Bench was whether the respondent who was in service till 31.12.1995 is entitled to the payment of retiral benefits at the rates as prevalent on that day or at the rate as revised with effect from 1.1.1996. The Central Administrative Tribunal, Kerala Bench upheld the claim of retired persons taking the view that those persons became pensioners on 1.1.1996. The Division Bench of Kerala High Court followed the judgment of the Supreme Court in **Banerjee case**, the judgment of the Division Bench of this Court in **Malakondaiah case** as well as the Division Bench judgment of Kerala High Court in O.P.No.32459 of 2001, dt.4.1.2002. It was held that the retired person continued in service till midnight of 31.12.1995, that he ceased to be in service from 1.1.1996 and that he acquires status of pensioner. It was also held that the claim to pension has to be determined at the rate prevalent on 1.1.1996. This judgment also does not support the submission of the learned counsel for the respondents.

In all the three judgments so far discussed, the issue was whether a Government servant retiring or voluntarily retiring on the last day of the preceding month can be treated to have acquired status of pensioner from the first day of succeeding month after the month in which such employee retired. The view consistently has been that from the midnight of the day of the superannuation, a Government servant becomes pensioner and all the benefits given by the Government with effect from first day of the month after retirement; assuming that such benefit is given - would be entitled for all the benefits.

**Findings in relation to other cases**

In **Union of India v Ashoke Kumar Banerjee,** the Supreme Court considered the question whether the respondent therein who was drawing the scale of pay as Junior Engineer and who on completion of fifteen years of service, was given the benefit of FR 22(1)(a)(i) in Assistant Engineer scale, is again entitled for another increment on regular promotion as Assistant Engineer on 01.08.1991 as per FR 22(1)(a)(i). The Supreme Court answered the question against the respondent and laid down as under.

> In our view, the respondent having received the same benefit in advance, while working as Junior Engineer and while not actually functioning as an Assistant Engineer, is not entitled to the same benefit of fresh fitment in the scale of Rs.2000-3500 when he is, promoted on 1-8-1991 as Assistant Engineer. This is because as on 1-8-1991, he is not being fitted into the "timescale of the higher post" as stated in the FR. That situation was already over when the OM was applied to him on his completion of 15 years. For the applicability of the FR 22(1)(a)(i) it is not merely sufficient that the officer gets a promotion from one post to another involving higher duties and responsibilities but another condition must also be satisfied, namely, that he must be moving from a lower scale attached to the lower post to a higher scale attached to a higher post.

The ratio laid down by the Supreme Court is to the effect that for fitment into time scale of pay of the higher post, it is not merely sufficient that officer gets promotion from one post to another post but another condition must be satisfied, namely, he must be moving from a lower scale attached to the lower post to higher scale. It was also observed that if an employee, who is given the higher scale, after completion of fifteen years is again given higher scale, the same would result in such employee getting higher scale of pay than his seniors.

Applying the same principle, so as to get increment falling due on the first of the succeeding month, an employee must satisfy not only the condition of becoming entitled, but also the other conditions, namely, he should continue to be on duty as a Government servant paid from consolidated fund of India, and such increment should have been taken into consideration for the purpose of payment of his salary for the month during which such person retires. When an increment is given in recognition of past one year service, the benefit of such increment will not accrue in the past or in present time but the benefit would accrue only from a point of time in future. When an employee retires on the last working day of the month he ceases to

be such Government servant and thus he would not get any benefit of such increment. Hence, no increment need be granted to such retired employee.

In **Union of India v R.Sarangapani,** Government of India issued office memorandum dated 22.10.1990 sanctioning increment to technicians, who underwent training and completed training on or after 01.01.1986 and the same benefit was denied to those technicians, who completed the training before 01.01.1986. When memorandum was challenged before Central Administrative Tribunal of Bangalore Bench, it was held that technicians appointed prior to 01.01.1986 would also be entitled to the benefit of office memorandum dated 22.10.1990. Following the same, in another application, Central Administrative Tribunal, Bangalore Bench allowed the applications, against which Civil Appeals were filed with special leave. Madras Bench of Central Administrative Tribunal took opposite view, by reason of which the matter was referred to Full Bench of Madras Bench, which overruled the earlier view of the Bangalore Bench and upheld the view of the Madras Bench. Be that as it is, before the Supreme Court it was contended that 1.1.1986 is the date co-terminus with the commencement of recommendations of the Fourth Pay Commission and that the increment is payable on 01.01.1986 only to those technicians, who are appointed on that date and not prior to that date. Repelling the ground of discrimination raised by the respondent employees, the Supreme Court ruled as under.

> … Naturally, the non-technical personnel could therefore be appointed earlier to the technical personnel even if both groups were selected at the same selection. Therefore, in view of the nature of the qualifications and nature of the posts and functions and duties, no equality in the dates of accrual of the increments could ever have been claimed by the technical personnel comparing themselves to the non-technical persons, by invoking Article 14.

Therefore, in the matter of accrual of increment by an employee after last working day of such an employee and the employee who still continues to be a Government employee are altogether different and an employee who retires cannot claim increment that would accrue on a date after retirement. Even though an increment is sanctioned after the completion of one year of service because the grant of increment is by way of incentive for the employee to work in future with same efficiency. In the case of retired employee, that eventuality would not arise.

In **State of Punjab v J.L.Gupta,** the respondents had retired on 31.03.1985 and their pensionary benefits were calculated as per the Rules in force at the time of their retirement. On 09.07.1985, Government of Punjab issued a notification ordering that the dearness allowance and ad hoc dearness allowance sanctioned upto Consumer Price Level Index No.568 will be treated as dearness pay for the purpose of calculating pension and gratuity in respect of employees retired on or after 31.03.1985. The respondents were not given the benefit. They filed the writ petition in Punjab and Haryana High Court. The High Court allowed the writ petition directing the State of Punjab to pay all the dues. The Supreme Court relying on its

earlier decision in **State of Punjab v Boota Singh** held that the respondents are not entitled to claim benefits, which became available at a later date. Applying the same, it must be held that Government servant who retires from service would not be entitled to any benefits except the pension according to the Rules.

I n **Malakondaiah case** (supra), the respondent employees moved Central Administrative Tribunal, Hyderabad Bench, for a direction to Principal Accountant General (Audit-I), Andhra Pradesh, to sanction annual increment for the year on the last day on which they retired in accordance with Rule 5(2) of the Pension Rules and whose pay was regulated under proviso to Note-1 below Rule 34 of the Pension Rules. The Tribunal following its earlier judgment allowed the O.As. The Union of India and others filed Writ Petitions before this Court. The two Writ Petitions were heard by a Division Bench. It was contended by Union of India that when an employee retires on the last day on which increment fell due, such employee is not entitled for increment because he ceased to be in service. Reliance was placed on Rule 33 of the Pension Rules and Article 151 of CS Regulations. The Division Bench repelled the said contention with the following observations.

> **The fact that the emoluments of a Government servant have to betaken as the basic pay, which he was receiving immediately before his retirement, is not at all in controversy. Similarly, the proposition that an increment accrues from the date following that on which it is earned is also not in dispute.** Increment in pay is a condition of service. In a way, it is a reward for the unblemished service rendered by an employee, which gets transformed into a right. Once an employee renders the service for the period, which takes with it an increment, the same cannot be denied to him/her. It is not in dispute that both the respondents rendered unblemished service for one year before the respective dates of their retirements. The periodicity of increment in the service is one year. On account of rendering the unblemished service, they became entitled for increment in their emoluments. …**The only ground on which the respondents are denied the increment is they were not in service to receive or to be paid the same. Strictly speaking, such a hyper-technical plea cannot be accepted.** As observed earlier, with the completion of the year's service, an employee becomes entitled for increment, which is otherwise not withheld. After completion of the one-year service, the right accrues and what remains thereafter is only its enforcement in the form of payment. Therefore, the benefit of the year-long service cannot be denied on the plea that the employee ceased to be in service on the day on which he was to have been paid the increment. There is no rule, which stipulates that an employee must continue in service for being extended the benefit for the service already rendered by him.
>
> (emphasis supplied)

In support of the above observations, the Division Bench also placed reliance o n **Banerjee case** (supra). We are afraid, the Division Bench was not correct in coming to the conclusion that being a reward for unblemished past service, Government servant retiring on the last day of the month would also be entitled for increment even after such increment is due after retirement. We have already made reference to all Rules governing the situation. There is no warrant to come to such

conclusion. Increment is given (See Article 43 of CS Regulations) as a periodical rise to a Government employee for the good behaviour in the service. Such increment is possible only when the appointment is "Progressive Appointment" and it is not a universal rule. Further, as per Rule 14 of the Pension Rules, a person is entitled for pay, increment and other allowances only when he is entitled to receive pay from out of Consolidated Fund of India and continues to be in Government service. A person who retires on the last working day would not be entitled for any increment falling due on the next day and payable next day thereafter (See Article 151 of CS Regulations), because he would not answer the tests in these Rules. Reliance placed on **Banerjee case** (supra) is also in our considered opinion not correct because, as observed by us, **Banerjee case** (supra) does not deal with increment, but deals with enhancement of DA by the Central Government to pensioners. Therefore, we are not able to accept the view taken by the Division Bench. We accordingly overrule the judgment in **Malakondaiah case** (supra).

**In Re Point No.(II).**

***Whether a retired Government servant is entitled for revised rate of D.A. which comes into force after such Government servant retires from service on attaining the age of superannuation?***

This question would arise only in Writ Petition No.22042 of 2003 as the respondent therein also claimed DA instalments at 49%. As held by us supra, a Government servant who would be retiring on the last day of the month would cease to be Government servant by mid-night of that day and he would acquire status of pensioner and therefore he would be entitled for all the benefits given to a pensioner with effect from first day of the succeeding month. In **Banerjee case** (supra), the Supreme Court laid down that as soon as first day of the succeeding month commenced, petitioner retired and gave the benefit of enhanced DA. The same view has been consistently followed in subsequent decisions as well. To that extent, it must be held that the learned Tribunal has taken correct view.

**Conclusion**

In the result, for the above reasons, we allow Writ Petition Nos.24191,24308, 24324 and 24325 of 2003. Writ Petition No.22042 of 2003 is partly allowed setting aside the impugned order of the learned

Tribunal insofar as the same held that the respondent is entitled to get annual increment due to him that fell due on 1.1.2002. We make no order as to costs.

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(**BILAL NAZKI, J)**

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**(V.V.S.RAO, J)**

**27.1.2005**

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**(P.S.NARAYANA, J)**

pln/bnr

Note:LR copy be marked.

(B.O)

pln/bnr

That Rule Nisi has been made absolute as above in W.P.Nos.24191, 24308, 24324 and 24325 of 2003. Rule Nisi has been made absolute to the extent indicated as above in W.P.No.22042 of 2003.

Witness the Hon'ble Sri Devinder Gupta, the Chief Justice on this Thursday the 27th day of January, two thousand and five.

To

(One fair copy to the Hon'ble Mr.Justice Bilal Nazki, for His Lordships kind perusal)

(One fair copy to the Hon'ble Mr. Justice V.V.S.Rao, for His Lordships kind perusal)

(One fair copy to the Hon'ble Mr.Justice P.S.Narayana, for His Lordships kind perusal)

1. The Principal Accountant General, Andhra Pradesh, Saifabad,

Hyderabad.
2. The Comptroller and Auditor General of India, Bahadur Shah Zafar

Marg, New Delhi.

3. The Central Administrative Tribunal, Hyderabad Bench at Hyderabad.

4. The Under Secretary, Union of India, Ministry of Law, Justice and

Company Affairs, New Delhi.

5. The Secretary, A.P.Advocates Association Library, High Court

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